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NO. 32729-5-II  
Cowlitz Co. Cause NO. 04-1-00819-8

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

KENNETH LEE KYLLO,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
07 MAR -2 PM 1:40  
STATE OF WASHINGTON  
BY DEPUTY

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**SUPPLEMENTAL BRIEF OF  
RESPONDENT**

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## **A. ADDITIONAL GROUNDS FOR REVIEW**

### **Answers to Additional Grounds for Review**

1. Under the invited error doctrine, Kylo is barred from objecting to his requested self-defense instruction on appeal.
2. Kylo received effective assistance of counsel.

### **Issues Pertaining to Additional Grounds for Review**

1. When a defendant requests an instruction be given to the jury, may he later assign error to the court giving the instruction to the jury? (Additional Ground 1.)
2. Is WPIC 17.04, defining when a person may act on appearances in defending himself, a permissible instruction? (Additional Ground 2.)
3. Could there have been a tactical reason for Kylo's attorney to request the instruction at issue? (Additional Ground 2.)

## **B. STATEMENT OF THE CASE**

The State relies on the Statement of Facts included in the State's Brief of Respondent, with the addition of any facts discussed *infra*.

### C. ARGUMENT

1. **UNDER THE INVITED ERROR DOCTRINE, KYLLO IS BARRED FROM OBJECTING TO HIS REQUESTED SELF-DEFENSE INSTRUCTION ON APPEAL.**

The court has ordered the State to provide supplemental briefing on the question of whether the jury was provided with faulty self-defense instructions lowering the State's burden of proof and thereby denying Kylo his right to due process. However, a party may not request an instruction and later complain on appeal that the requested instruction was given. *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

At trial in Kylo's case, Kylo filed Defendant's Proposed Jury Instructions. CP 67-106. The proposed instructions included WPIC 17.04, which read as follows:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 32 (Proposed Instruction 11); *see* 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04, at 203 (2d ed. 1994) (WPIC). The trial

court gave that instruction to the jury without objection. CP 33 (Instruction 13); 13RP 349-51. This is the instruction that Kylo now challenges on appeal.

Here, the record is clear that Kylo requested the jury instruction at issue. Consequently, the doctrine of invited error prevents him from now complaining about the trial court acceding to his request to give a certain instruction.

**2. KYLLO RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Kylo also argues in his statement of additional grounds that he was deprived of his constitutionally guaranteed right to the effective assistance of counsel due to his attorney's proposal of the jury instruction discussed in the previous section. Although this court did not specifically ask that the State respond to this particular additional ground, the State is addressing it at this point since it is closely tied with the additional ground the court did request the State to address (regarding the allegedly faulty instruction and Kylo's due process rights).

There is a strong presumption that counsel's representation was effective. *Studd*, 137 Wn.2d at 551, 546, 973 P.2d 1049; *State v. Rodriguez*, 121 Wn.App. 180, 184, 87 P.3d 1201 (2004). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *Rodriguez*, 121 Wn.App. at 184, 87 P.3d 1201. Kylo must show his lawyer's performance was deficient and that the deficiency prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Rodriguez*, 121 Wn.App. at 184, 87 P.3d 1201. Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *Studd*, 137 Wn.2d at 551, 546, 973 P.2d 1049; *McFarland*, 127 Wn.2d at 334-35, 899 P.2d 1251 (1995); *Rodriguez*, 121 Wn.App. at 184, 87 P.3d 1201.

**(a) The invited error doctrine vs. a claim of ineffective assistance of counsel.**

Again, under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm. *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *Rodriguez*, 121 Wn.App. at

184, 87 P.3d 1201 (2004). However, review is not precluded when the claim is that counsel was ineffective in requesting the improper instruction. *Aho*, 137 Wn.2d at 744-45, 975 P.2d 512; *Rodriguez*, 121 Wn.App. at 184, 87 P.3d 1201. Kylo has made such a claim in his Statement of Additional Grounds for Review. At issue then in Kylo's case is the self-defense instruction that was proposed by Kylo's attorney and given by the court.

- (b) The performance of Kylo's attorney was not deficient; therefore, he cannot prevail on a claim of ineffective assistance of counsel.**

Again, to prevail on a claim of ineffective assistance of counsel, Kylo must first show his lawyer's performance was deficient. Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *Studd*, 137 Wn.2d at 551, 546, 973 P.2d 1049; *McFarland*, 127 Wn.2d at 334-35, 899 P.2d 1251 (1995); *Rodriguez*, 121 Wn.App. at 184, 87 P.3d 1201.

- i. The challenged instruction was not improper.**

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and, when



read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999). However, our Supreme Court subjects self-defense instructions to more rigorous scrutiny. *Rodriguez*, 121 Wn.App. at 185, 87 P.3d 1201 (2004). Jury instructions on self-defense must more than adequately convey the law. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Id.* A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. *Id.*

Self-defense requires only a subjective, reasonable belief of imminent harm from the victim. *State v. LaFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. *Id.* The instructions should allow the jury to put themselves in the defendant's shoes and from that perspective determine the reasonableness from all surrounding facts and circumstances as they appeared to the defendant. *Id.* at 900, 913 P.2d 369.

Again, in *Kyllo's* case, the court instructed the jury as follows:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that

he is in actual danger of *great bodily harm*, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 33 (Instruction 13) (emphasis added); *see* 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04, at 203 (2d ed. 1994) (WPIC). Despite having proposed that instruction, Kylo now argues that the instruction interjected an impermissible objective standard into the instructions by the use of the phrase “great bodily harm”.

At least one court has considered the propriety of this instruction in a case similar to Kylo’s. *Rodriguez*, 121 Wn.App. at 185-86, 87 P.3d 1201. Rodriguez was charged with assault in the first degree after an incident in which the victim shoved him. *Id.* at 183, 87 P.3d 1201. Rodriguez pulled a knife, and a scuffle ensued. *Id.* During the scuffle, Rodriguez stabbed the victim in the side. *Id.* Rodriguez testified at trial that he had armed himself with a knife because he was afraid of the victim, with whom there had been a history of acrimony. *Id.* Rodriguez testified that he pulled out the knife as he was being pushed to try to keep the victim at bay. *Id.* Rodriguez testified that he did not stab the victim deliberately but rather that it happened as he was trying to catch his balance and the victim leaned into him. *Id.*

In *Rodriguez*, the trial court gave an instruction identical to the one Kylo proposed and is now challenging. *Id.* at 185, 87 P.3d 1201. Unlike Kylo who was charged with assault in the second degree, Rodriguez was charged with assault in the first degree. As part of the trial court's instructions on assault in the first degree, it gave a definition of the term "great bodily harm". *Id.* at 186, 87 P.3d 1201. The court instructed the jury that:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

*Id.* This was the only definition of "great bodily harm" given to the jury.

*Id.* On review, Division Three held that, based on this definition of great bodily harm, the jury easily could have found that in order to act in self-defense, Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or a loss of a body part or function. *Id.* The court held that the instruction reduced the State's burden to disprove self-defense. *Id.* at 188, 87 P.3d 1201.

However, Kylo's case is distinguishable from *Rodriguez*. Kylo was charged with assault in the second degree, instructions on which did not include any definition of great bodily harm. CP 33. Division Three

briefly contemplated the propriety of this self-defense instruction in cases that did not involve a crime that included an element of “great bodily harm”. The court said, “... standing alone or with other instructions to the jury on the question of self-defense, this statement would at least be innocuous and perhaps even an accurate statement of the law.” *Id.* Because the jurors in *Kyllo*’s case were not given a definition of great bodily harm, the instruction given did not exclude ordinary batteries or prohibit the jury’s consideration of the *Kyllo*’s subjective impressions of all the facts and circumstances.

Division Two addressed the same issue in *State v. Marquez*, 131 Wn.App. 566, 127 P.3d 786 (2006). *Marquez* was also charged with first-degree assault but was found guilty of second-degree assault. On appeal, he challenged the use of the term “great bodily harm” in a defense-of-others instruction similar to the self-defense instruction used in *Rodriguez* and in *Kyllo*’s case. As Division Three had done in *Rodriguez*, Division Two held that the “great bodily harm” instruction given as part of the first-degree assault instructions could have misled the jury to believe that *Marquez* was justified in defending another only if he reasonably believed the person he was defending was in danger of being killed or would have

suffered from serious permanent disfigurement or impairment. *Marquez*, 131 Wn.App. at 566, 127 P.3d 786. As it was with *Rodriguez*, Kylo's case is distinguishable from *Marquez*. In Kylo's case, the jury was not given a definition for great bodily harm. Especially in light of the other self-defense instructions given in Kylo's case, the challenged instruction did not exclude ordinary batteries or prohibit the jury's consideration of the Kylo's subjective impressions of all the facts and circumstances.

The instruction requested by Kylo and given by the court was proper. Therefore, the performance of Kylo's attorney was not deficient, and Kylo cannot prevail on a claim of ineffective assistance of counsel.

ii. **Even if the instruction was improper, there was a tactical reason for Kylo's attorney to request it.**

Again, to prove that his attorney's performance was deficient, Kylo must demonstrate the absence of legitimate strategic or tactical reasons for proposing the challenged jury instruction. Throughout the trial, defense counsel made clear to the jury that Kylo's theory of the case was that Kylo believed Mickens was going to kill him and that Kylo had no other reasonable choice but to bite Mickens' ear off. Given this theory of the case, the challenged instruction could legitimately be seen by

defense counsel as having buttressed defense counsel's argument. Based on this tactical reason for proposing the instruction, the performance of Kylo's attorney was not deficient.

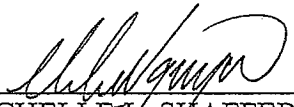
#### **D. CONCLUSION**

The trial court properly gave Kylo's requested instruction, and Kylo's attorney did not perform ineffectively. Kylo's conviction should be affirmed.

Respectfully submitted this 28<sup>th</sup> day of February, 2007.

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STATE OF WASHINGTON

BY: *[Signature]*  
DEPUTY

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on February 28, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

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ATTORNEY AT LAW  
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KALAMA, WA 98625

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WASHINGTON STATE REFORMATORY A-402  
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CLERK, COURT OF APPEALS  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402

each envelope containing a copy of the following documents:

1. SUPPLEMENTAL BRIEF OF RESPONDENT
2. Affidavit of Mailing.

*Audrey J. Gilliam*

SUBSCRIBED AND SWORN to before me this February 28, 2007.

*Mike J. DeSosa*

Notary Public in and for the State  
of Washington residing in Cowlitz

Co. My commission expires: 10-19-09

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